United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

No. 74-1646

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC., and
TRANS WORLD AIRLINES, INC.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of an Order of
the Civil Aeronautics Board

BRIEF FOR INTERVENORS
NATIONAL AIR CARRIER ASSOCIATION, INC.
CAPITOL INTERNATIONAL AIRWAYS, INC.
OVERSEAS NATIONAL AIRWAYS, INC.
SATURN AIRWAYS, INC.
TRANS INTERNATIONAL AIRLINES, INC.
WORLD AIRWAYS, INC.

ROBERT M. LICHTMAN
ROBERT E. NAGLE

Lichtman, Abeles, Anker & Nagle, P.C.
1730 M Street, N. W. – Suite 900
Washington, D. C. 20036

Attorneys for Intervenors

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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STATEMENT OF THE ISSUE PRESENTED

Whether foreign-originating travel group and advance booking charters, as authorized by the Civil Aeronautics Board in the regulations under review,

constitute "charter trips" within the meaning of the Federal Aviation Act's definition of "supplemental air transportation."[1]

STATEMENT OF THE CASE

This case presents for review regulations of the Civil Aeronautics Board, adopted on March 15, 1974 after extensive rulemaking proceedings, which permit U.S. certificated air carriers and foreign air carriers to perform foreign-originating travel group charters (TGC's) and advance booking charters (ABC's) organized in compliance with the rules of the country of origin so long as: (1) those foreign rules are substantially similar to the Board's TGC rules, and (2) there is a formal agreement in effect between the country of origin and the United States with respect to the charterworthiness of such operations. (Regulation SPR-74, April 22, 1974, App. 2a-27a).[2]

Intervenor National Air Carrier Association, Inc. (NACA), a trade association of U.S. supplemental (*i.e.*, charter) airlines, participated in the proceedings below before the Board on behalf of its member airlines. NACA and its member carriers have intervened here in support of the Board's decision to authorize foreign-originating TGC/ABC services.

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[1] Federal Aviation Act of 1958 (72 Stat. 731), as amended, 49 U.S.C. 1301, *et seq.* Section 101(36) of the Act defines "Supplemental air transportation" to mean "charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act." This definition provision was designated as Section 101(36) of the Act by Pub. L. 93-366, effective August 5, 1974. Immediately prior to that date it had been designated as Section 101(34) of the Act.

[2] "App." references are to pages in the Appendix filed by petitioners. "Tr." references are to pages of the record below, an index of which has been certified by the Board to this Court.

Background

This proceeding presents one facet of a policy decision by the Board, as well as the regulatory authorities of other nations, to seek to develop alternatives to the "prior affinity" charter, which has for years served as the principal mode of charter service.[3] This policy, the Board has said "stemmed from two principal factors":

> ". . . (1) the Board's growing concern that our existing rules, limiting charter travel to groups having a 'prior affinity,' tended to discriminate against members of the public who did not belong to qualified organizations with a membership large enough to successfully mount a charter program; and (2) the fact that our existing rules have proven to be extremely difficult to enforce." (Regulation SPR-61, adopted September 27, 1972, p. 1, 37 Fed. Reg. 20808).

In 1971, the Board instituted a rulemaking proceeding to develop a new type of charter, not premised on pre-existing membership in a club or other organization.[4] The ultimate result of the proceeding was adoption of the Board's TGC rules. (14 C.F.R. Part 372a.)

The basic scheme of these rules is to permit any group of 40 or more persons to charter an aircraft or a portion thereof, subject to numerous restrictive conditions. The group must be formed long in advance of the departure date, travel on a round-trip flight, and depart and return together. Each tour participant must pay a pro rata portion of the charter price, and must make a substantial deposit when he joins the group, which is subject to forfeiture if the participant later changes his plans. TGC groups can be

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[3] A "prior affinity" charter is a flight contracted for by a pre-existing organization formed primarily for purposes other than travel and made available only to its bona fide members and their families. See 14 C.F.R. Parts 207, 208, 212 and 214.

[4] Regulation ER-659, January 29, 1971; Advance Notice of Proposed Rule Making (SPDR-22), Docket 23055, January 29, 1971, 36 Fed. Reg. 2514.

formed only by "charter organizers" – persons not controlled by a direct air carrier who, in consideration of a service charge, make the arrangements for the flight, and also comply with the difficult filing and bonding provisions of the rules.

The scheduled carriers, including the present petitioners, vigorously opposed the promulgation of the TGC rules, and appealed the Board's decision. *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284 (D.C. Cir. 1973). Many of the arguments made in the present proceeding were also addressed to the District of Columbia court. The carriers contended that the rules did not adequately differentiate between scheduled and charter service, that TGC's would directly compete with rather than supplement scheduled service, and that the Board had improperly abolished "prior affinity" as a charter requirement. Each of these arguments was rejected. *Id.* at 1291-93. The court found that no particular condition or restriction is a prerequisite of charter service; rather, it is for the Board to develop restrictions which, as a practical matter, reasonably differentiate between charter and scheduled service. (*Ibid.*). In regard to the carriers' insistence that "prior affinity" was a necessary element of a charter, the court observed (*id.* at 1292-93):

> "The Board correctly recognized that this non-travel 'affinity' was not statutorily required, but only a vehicle to insure that charter travel did not become a guise for individually ticketed services. So long as such organizational membership is not necessary to insure the distinction – which can be and is maintained by travel related restrictions in both the inclusive tour and now in the TGC charters – it is not a *sine qua non* for legality."

The holding in *Saturn Airways* that "prior affinity" was not a necessary prerequisite for a charter paralleled contemporaneous developments in international air transportation. In October 1972, representatives of the governments of the United States, Canada, and the 21 member states of the European Civil Aviation Conference (ECAC) met in Ottawa, Canada and issued a joint Declaration of Principles for North Atlantic Charter Flights (Ottawa Principles). As the Board has stated, "the Ottawa Principles were developed as a means to

establish, during a period of experimentation with non-affinity charter concepts, a generally agreed framework which would permit all North Atlantic countries to establish substantially similar rules which could be reciprocally recognized."[5] The Department of State promptly announced United States acceptance of the Ottawa Principles, and expressed willingness to undertake discussions with other interested authorities in order "to arrive at [a] mutually agreeable regime for particular bilateral traffic flows and to ensure fully reciprocal treatment for U.S.-originating TGC flights." (App. 5a.)

Subsequently, as the Board stated, "a number of other foreign governments have adopted their own charter regulations, which are based upon the Ottawa Principles and incorporate restrictive features similar, but not identical to those contained in Part 372a." (Tr. 5.) In addition, bilateral Memoranda of Understanding have since been signed by the U.S. and the United Kingdom, the Netherlands, the Federal Republic of Germany, France and Ireland (App. 6a.) These Memoranda of Understanding provide that each party will accept as "charterworthy" traffic "originated in the territory of the other Party" and organized and operated "pursuant to the advance charter (TGC or ABC) rules of that Party." (App. 6a.) Further, the Memoranda with France, the Federal Republic of Germany and the United Kingdom provide that the United States undertakes that its regulatory authorities will "[b]egin and conclude, as soon as practicable, rulemaking procedures to implement acceptance of the advance booking charter (ABC) rules" of the other Party. (App. 6a.)

The regulations under review grew directly out of these international developments. In accordance with the undertakings entered into by the U.S. government, the Board initiated the present proceeding by proposing to amend Part 372a "so as to authorize foreign air carriers holding section 402 permits, as well as all certificated U.S. carriers, to perform foreign-originated TGC's or advance booking charters, organized in compliance with the rules of the country

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[5] Notice of Proposed Rule Making, SPDR-33, September 4, 1973, p. 5 (Tr. 5.)

of origin, so long as (1) those foreign rules are substantially similar to ours, and (2) there is in effect, between the country of origin and the United States, a formal agreement with respect to the charterworthiness of such operations." (Tr. 1-16.)

The Board proposed a series of conditions which the foreign rules must embody to be considered "substantially similar." These included requirements that a TGC/ABC must involve a round-trip flight and that participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip, as well as requirements relating to the minimum number of seats to be contracted for, advance filing of lists of participants and minimum lengths of stay. While the proposed rules did not mandate the pro rata requirement of the Board's own TGC rules, they did provide for more stringent restrictions in those cases where the foreign rules do not include a pro rata requirement.

The Board's Decision

The principal legal issue argued by the parties in the proceedings before the Board was whether (as contended by NACA and others) foreign-originating TGC/ABC's are "charter trips" within the meaning of the Act or whether (as argued by the scheduled carriers) they constitute individually-ticketed transportation, which cannot be performed by U.S. supplemental air carriers.

In its decision adopting the rules in the form proposed, the Board identified the travel-together, round-trip, advance-filing, and minimum-stay requirements as conditions whose cumulative effect maintained the distinction between charter and individually-ticketed services. (App. 12a-13a.)

The Board specifically dealt with the scheduled-carrier contention that a pro rata pricing requirement – as found in the Board's TGC rules – was necessary in order to preserve the statutory distinction. "This [pro rata] factor," it stated, "has never been considered a *sine qua non* of charters. Even though the presence of this factor in a charter rule goes a long way toward indicating

that the statutory distinction is being preserved, the absence of a pro rata feature hardly establishes the converse. Indeed, except for outbound TGC's and prior affinity charters, none of the other types of charters . . . require all participants to share equally the total charter costs. . . ." (App. 13a.) The Board noted that foreign-originating TGC/ABC's without a pro rata requirement would be subject to a number of additional restrictive conditions not otherwise applicable – including a longer minimum-stay period, more stringent restrictions upon assignment to standby-list passengers, and a prohibition against split charters which combine TGC/ABC groups and other types of charter groups aboard the same aircraft – and that "[t]he effect of these rules . . . is to assure that, on an overall basis, the different sets of restrictions applicable to either situation will be comparably stringent." (App. 13a-14a.)

Earlier, in its Notice of Proposed Rule Making, the Board had stated that "we have given great weight to the fact that the pro rata characteristic of our TGC rule appears to be unacceptable to a number of foreign governments for charters originating in their territory. Our insistence on this one requirement . . . could thus result in effectively aborting the TGC experiment. Moreover, as a general principle, we are mindful that the international aviation system cannot maintain its viability if every government rigidly insists on imposing its own regulatory concepts on other sovereign states." (Tr. 8-9.) In adopting its proposed rules, the Board observed that all of the countries subscribing to the Ottawa Principles were committed to preserving the distinction between group and individually-ticketed service. The Board continued:

> "Thus, in asking us to conclude that sets of restrictions which comport with the Ottawa Principles and our proposed rule for foreign-originating charters nevertheless fail to preserve the essential distinction between individually ticketed and supplemental air transportation, the Trunkline Carriers are asking us to conclude that a considerable number of foreign governments, including many of the leading powers in the international aviation community, either have completely mistaken the problem or have abandoned their long-held policies of preserving the foregoing distinction. We cannot subscribe to any such conclusion." (App. 15a.)

Finally, the Board noted that, contemporaneously with its decision, it was issuing a Notice of Proposed Rule Making proposing some relaxation of its existing TGC rules, and explained that if it should finally adopt such proposals it would similarly revise any parallel requirements of the new foreign-originating TGC rules. (App. 3a, note 3a.) This proposed rule making, undertaken because the existing restrictions had rendered TGC's "virtually unmarketable,"[6] was completed on August 12, 1974.[7]

As amended by the August 12 rule, the restrictions and conditions which foreign TGC/ABC rules must contain to be considered "substantially similar" include the following:[8]

1. A TGC/ABC must involve a round-trip flight.

2. The participants in each TGC/ABC group must travel together on both the outbound and inbound portions of the trip.

3. Each TGC/ABC contract must cover at least 40 seats.

4. The list of actual participants (*i.e.*, persons contractually bound to pay for a specifically identified flight) in each TGC/ABC group must be filed with appropriate regulatory authorities at least 60 days in advance of departure.

5. If the cost of the TGC/ABC is prorated among participants, then the charter must have a minimum duration of at least seven days in the case of charters within North America, and at least 10 days in the case of all other charters. If the cost to individual TGC/ABC participants is not prorated, then charters to points outside North America must have a minimum duration of 14 days during the peak travel period (April 1 to

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[6] Regulation SPR-78, August 12, 1974, p. 17, 39 Fed. Reg. 29345, 29347.

[7] The principal changes made by these amendments to the TGC rules was to reduce the advance-filing period from 90 to 60 days, and to revise the provisions relating to assignment of seats.

[8] See 39 Fed. Reg. 29345, 29349-50.

October 31) and a minimum duration of at least 10 days during the non-peak period; non-prorated North American TGC/ABC's must have a minimum duration of seven days.

6. If the cost to individual participants is not prorated and there is a list of standby passengers – as is the case under the rules of a number of foreign countries – no person may be added to the standby list within 60 days of departure and the number of standbys may not be greater than the number of seats contracted for; not more than 15 per cent of the participants may assign their interests to such standbys; and no standbys may be substituted for participants within 30 days of departure. If the cost to individual participants is prorated, then a participant may avoid forfeiture of his advance payments by assigning his interests to members of the general public, but only if no more than 15 per cent of the participants have made such assignments, and the assignment is effected through the charter organizer.

7. If the cost to individual TGC/ABC participants is not prorated, then split charters involving TGC/ABC groups and other types of charter groups are prohibited.

ARGUMENT

FOREIGN-ORIGINATING TRAVEL GROUP AND ADVANCE BOOKING CHARTERS WHICH MEET THE STANDARDS PRESCRIBED IN THE BOARD'S REGULATIONS CONSTITUTE "CHARTER TRIPS" WITHIN THE MEANING OF THE FEDERAL AVIATION ACT.

Although the Federal Aviation Act contains no specific definition of "charter," it is well established that "a prime concern of Congress was to maintain the integrity of the charter concept – to preserve the distinction between group and individually ticketed travel." *American Airlines, Inc. v. CAB*, 348 F.2d 349, 354 (D.C. Cir. 1965); *Pan American World Airways, Inc. v. CAB*, 380 F. 2d 770, 779 (2d Cir. 1967), aff'd by an equally divided court *sub nom. World*

Airways, Inc. v. Pan American World Airways, 391 U.S. 461 (1968); *Saturn Airways, Inc. v. CAB, supra*, 483 F.2d at 1288-89. It is also established that, within these limits, Congress intended that "the Board should be free to evolve a definition. . . ." *American Airlines*, 348 F.2d at 354; *Saturn Airways*, 483 F.2d at 1288.

Petitioners, however, would deny the Board this latitude. They repeatedly assert that it was only the "traditional charter concept" which Congress sought to preserve, and that Congress failed to define "charter" solely to give the Board "flexibility to guard against any subterfuges that might emerge. . . ." (Pet. Br. 10-11.) Each change in Board charter policy is termed a "consistent erosion" (Pet. Br. 4-5) – further reflecting petitioners' desire to freeze the charter concept. Such a hidebound view, however, is at variance with much of the legislative history of both the 1962 and 1968 amendments to the Act as well as a series of court decisions – all of which demonstrate that "Congress has given the Board a singularly clean slate upon which to write its conception of charter services" (*Trans International Airlines v. CAB*, 432 F.2d 607, 609 (D.C. Cir. 1970)).

In the present proceeding, we submit, the Board's rulemaking action is a proper exercise of the discretion given it under the Act, and the minimum requirements for foreign-originating TGC/ABC's which the Board has established fully maintain the required distinction between group and individually ticketed travel.

A. Congress Has Authorized the Board to Promulgate Charter Rules Which Reflect Changed Conditions or Needs so Long as Its Rules Reasonably Differentiate Between Charter and Individually-Ticketed Air Transportation.

In acting on the 1962 amendments to the Act, the House Interstate and Foreign Commerce Committee rejected a Senate version containing a definition of "charter," stating (H. Rep. No. 1177, 87th Cong., 1st Sess. (1961), at 11):

> "Your committee, however, after considering the problem, came to the conclusion that under the circumstances, authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead to complications."

The House version with respect to this issue prevailed in conference.

The scheduled airlines, including petitioners, have nevertheless been quick to challenge each subsequent set of Board rules which in any way alter what they regard as the "traditional" charter concept. The first such challenge, in 1965, was to the Board's split-charter rules, which permitted the chartering of one-half of an aircraft to each of two unrelated groups. The District of Columbia Circuit, however, upheld the regulations, and specifically rejected the view that the concept of "charter" was immutably frozen. *American Airlines v. CAB, supra*, 348 F.2d 349. The court was "unable to conclude that the term charter trips has a fixed meaning. . . ." (*Id.* at 354.) It refused to infer from the Act "a definition embalmed, for example, in such origins as the admiralty law growing out of the sailing vessel era," and stated:

> "We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such factors as changing needs and changing aircraft. . . . We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain the integrity of the charter concept – to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions." (*Ibid.*)

A second round of litigation began in 1966 when the scheduled carriers challenged the Board's inclusive tour charter (ITC) rules.[9] Domestic inclusive

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[9] These flights are chartered by an independent tour operator, who markets an inclusive tour package consisting of both air transportation and land accommodations to members of the general public. The tour is offered at a single package price, and the tour operator bears the commercial risk of unsold seats. 14 C.F.R. Part 378.

tour charters were upheld by the District of Columbia Circuit (*American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966), but this Court, disagreeing in its interpretation of the Act's legislative history, struck down the authorization of international inclusive tour charters as beyond the scope of the Board's authority. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967), aff'd by an equally divided court *sub nom. World Airways, Inc. v. Pan American World Airways*, 391 U.S. 461 (1968).

This judicial impasse was quickly resolved by Congress, which adopted legislation specifically authorizing supplemental carriers to conduct both domestic and international inclusive tour charters. (Public Law 90-514, 82 Stat. 867 (1968).) The Congress emphasized that under the ITC legislation the Board's authority "is clarified, not enlarged" – in effect agreeing with the decision of the District of Columbia court that the Board had the authority to authorize inclusive tour charters under the 1962 legislation. See H. Rep. No. 1639, 90th Cong., 2nd Sess. (1968), p. 4.[10] The House Committee further stated:

> "We recognize that shifting economic considerations and the public convenience and necessity may require modification in the [ITC] regulations. We do not undertake here to proscribe the usual rulemaking procedures of the CAB, *and will leave the Board with its present flexibility*, which must be exercised within the confines of the statute, due process, and full participation on the part of interested parties in the Board's rulemaking proceedings. (H. Rep. No. 1639, *supra*, at 3; emphasis added.)

The most recent attempt to restrict the latitude of Board rule making came in response to the Board's promulgation of its TGC regulations. In ruling on the scheduled carriers' objections, the District of Columbia Circuit in *Saturn*

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[10] The Senate Report also states that the purpose of the legislation was to "clarify Congress' intent," and further explains that it "would leave supplemental air carriers in precisely the same position they were under the certificates of public convenience and necessity issued by the Board and the regulations prescribed by the regulations prescribed by the Board prior to the adverse court decisions." S. Rep. No. 1354, 90th Cong., 2nd Sess. (1968), pp. 2, 8.

Airways, supra, recognized the need for Board leeway in this area and adopted a pragmatic standard of review: "the test we must apply is result oriented – one cannot really know how the public will react and how the TGC's will affect scheduled travel until they are tested in the crucible of the marketplace." 483 F.2d at 1291. In the court's view, no particular set of conditions was required to distinguish group and individually-ticketed travel; rather, it concluded that the entire package of TGC restrictions – which were "the result of painstaking and reasoned analysis by the Board" – constituted an adequate differentiation. *Id.* at 1292.

The *Saturn* court noted that it was "impressed" with five particular conditions characterized by the Board as "substantial and vital" in its argument before the court. (*Ibid.*) These conditions are listed at page 6 of petitioners' brief, and petitioners have sought to infer that these conditions are essential to the distinction between charter and scheduled service. (See Pet. Br. 6-8, 12.) This contention, however, is simply a further attempt by petitioners to have the courts do what Congress has refused to do – namely, to "freeze a definition of charter service into law" (H. Rep. No. 1177, *supra,* at 11). As the Board has pointed out in commenting on *Saturn,* "the Court of Appeals did not hold . . . that each of the restrictions of TGC's is indispensable to maintain the distinction between TGC's and individually-ticketed services, nor has the Board ever so held. To the contrary, in adopting the TGC rules, the Board separately listed a number of restrictive features of TGC's, *each of which* distinguished TGC's from individually ticketed services. . . ." (App. 10a-11a; emphasis in original.)

Thus, instead of viewing any single restriction or set of restrictions as indispensable to the charter concept, we submit that a reviewing court should (as in *Saturn*) evaluate in a pragmatic fashion the cumulative effect of all of the restrictive features imposed by the Board to determine whether the distinctions from individually-ticketed services have substance. In this manner, the Board will be free to modify the charter concept as warranted by changing

needs and developments in air transportation,[11] so long as it takes care to provide a meaningful distinction between group and individually-ticketed travel. As we now show, the rules adequately provide that distinction.

B. The Rules Under Review Adequately Distinguish Charter and Individually-Ticketed Service.

In arguing that the particular restrictions listed in the *Saturn* opinion are indispensable to the distinction between charter and scheduled services, petitioners neglect to describe the entire complex of restrictions contained in the rules under review. The fact is that the Board's foreign-originating TGC/ABC rules – while they may differ from the rules considered in *Saturn* – contain numerous substantial restrictions not normally incident to individually-ticketed service (see pp. 8-9, *supra*).

For example, an individually-ticketed passenger is free to make his travel plans at the last minute, and is not required to become a contractually-bound member of a group more than 60 days before departure. If an individually-ticketed passenger does buy his ticket in advance, he is of course free to redeem his ticket at any time without penalty should his travel plans change.[12] An individually-ticketed passenger has a choice between purchasing a one-way or round-trip ticket and may depart and return whenever he wishes. He is

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[11] Here, as discussed above (pp. 3-5, *supra*), the need for the instant rules is found in the serious problems which exist regarding "prior affinity" charters and the multi-national undertaking to implement the Ottawa Principles. In this connection, it should be noted that section 1102 of the Act, 49 U.S.C. §1502, provides in pertinent part: "In exercising and performing [its] powers and duties under this Act, the Board . . . shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . ."

[12] While foreign rules do not in general mandate a forfeiture-of-deposit requirement, the Board found that "organizers of foreign-originating TGC/ABC's will undoubtedly, in their own economic interest, include in participants' contracts provisions for required times of payment, partial or complete forfeiture in the event of default or change of plans, cancellation of the charter under certain circumstances, and so forth." (App. 10a, n. 6a.)

not required to depart on a specified flight as a member of a particular, large group, remain at his destination for a fixed period of time (which must exceed a given minimum), and return on a specified flight with the same group.

1. While petitioners contend that such differences are meaningless and fail to maintain a distinction between individually-ticketed and charter service, their contentions are demonstrably without merit.[13] For instance, petitioners state that "the requirement that a travel group of 40 persons be assembled . . . 90 days in advance of departure . . . is meaningless in distinguishing between the sale of individually-scheduled transportation and charters." (Pet. Br. 12.) As sole support for that assertion, they cite surveys (not part of this record) which assertedly "indicate that over 70% of transatlantic passengers in regularly scheduled service plan their trips at least four months in advance." (*Id.* at 12-13.) However, petitioners first fail to point out that the time deadline is a *filing* requirement which, as a practical matter, will necessitate group formation and contractual commitments well before the filing deadline. Moreover, even if many transatlantic passengers plan trips well in advance of departure, this is hardly equivalent to planning a trip subject to the rule's restrictive set of conditions. As the Board pointed out during the original TGC proceeding, "[i]t is one thing for a passenger to plan a trip or have a reservation on a scheduled flight several months in advance, knowing that he is free to

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[13] It should be noted that the scheduled carriers habitually argue that restrictions proposed by the Board are meaningless in distinguishing individually-ticketed and charter travel, and that the latter will consequently swallow up the former. This proclivity toward what the District of Columbia Circuit has termed their "consistent lamentations and predictions of doom by diversion" (see p. 20, *infra*), led the scheduled carriers to predict, during the original TGC proceedings, that "at least one-third and as much as two-thirds of existing scheduled traffic would shift to travel group charters if the program is implemented" (Comments of TWA, February 22, 1972, Docket 23055, p. 4), and that "80 percent of economy traffic in the transatlantic market may switch to charter service during peak season, with 70 percent switching during the off-peak season." (Comments of Pan American World Airways, Inc., February 18, 1972, Docket 23055, p. 6.) These claims were directed to TGC rules which, the Board recently found, made TGC's "virtually unmarketable." (Regulation SPR-78, *supra*, p. 17, 39 Fed. Reg. at 29347.)

change his plans or reservations at will, without incurring monetary risk; but that situation is quite different from the kind of advance planning and risk entailed by participation in a TGC." (Regulation SPR-61, *supra*, p. 16, 37 Fed. Reg. 20808.)

Petitioners seek to explain away the group-travel, group-size and minimum-stay requirements by pointing out that many of the scheduled carriers' own discount fares – *e.g.*, their group inclusive tour and excursion fares – have similar restrictions.[14] (Pet. Br. 13.) But this argument, as the Board pointed out in the TGC proceeding, "boils down to the assertion that any type of traffic which is carried on scheduled services is automatically foreclosed to charter services, in order to distinguish charter services from scheduled services." (Order 72-10-82, October 25, 1972, pp. 19-20.) Petitioners' argument carried to its logical conclusion would mean that "prior affinity" groups are ineligible to charter because scheduled airlines offer affinity group fares to such groups.

The fact is that when Congress cautioned the Board to prevent charters from serving as a guise for scheduled service, its intent was not to protect discount-fare services developed by the scheduled carriers to compete with charters, but rather to prevent diversion from conventional individually-ticketed service. Senator Monroney, the co-sponsor of the 1968 ITC legislation, clearly explained what was meant by individually-ticketed travel during hearings on the legislation: "This [ITC's] has nothing to do with individual ticketing. . . . It is a lot different from walking down with your checkbook in hand, or your credit card, and saying: 'Give me a trip to Stockholm.'" (Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S.3566,

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[14] The scheduled carriers' development of discount fares as a competitive response to charters is discussed at length in *National Air Carrier Association v. CAB*, 436 F.2d 185, 186-7 (D.C. Cir. 1970); *National Air Carrier Association v. CAB*, 442 F.2d 862, 867 (D.C. Cir. 1971); Order 72-10-82, October 25, 1972, at p. 20, n. 20. The group-size and minimum-stay restrictions of these discount fares were adopted for the same reason that the Board has adopted such restrictions in its TGC/ABC rules, namely, to preclude substantial diversion of normal individually-ticketed passengers.

90th Cong., 2nd Sess. 95 (1968).) It is *this* type of travel which the Board must take pains to differentiate.

2. Petitioners also suggest that the Board's regulations are invalid because they allow solicitation of the "general public." (Pet. Br. 12.) There is not, however, any requirement under the Act that precludes drawing charter participants from the general public. While this factor is a principal one in distinguishing "prior affinity" charters from individually-ticketed transportation, in the case of other types of charters the existence of other restrictions has been deemed sufficient to preserve the statutory distinction. Thus, ITC's (which are explicitly authorized under the Act) are drawn from the general public, but are subject to a tour-basing requirement (*i.e.*, both air and ground accommodations must be purchased) and numerous other restrictions. Participants in study group charters under Part 373 of the Board's regulations (14 C.F.R. Part 373) are likewise drawn from the general public, but they are required to participate in a program of formal academic study abroad.

Moreover, while TGC/ABC participants are originally solicited from the general public, they become a distinct group at least two months in advance of departure. And, of course, as we have already discussed, these passengers are subject to a complex of restrictions to which individually-ticketed passengers are not exposed.

3. Petitioners conclude their brief by arguing that "foreign-originating TGC's do not supplement . . . scheduled service," apparently because "the Board's foreign-originating TGC regulations authorize the U.S. supplemental carriers to compete directly with the . . . trunkline carriers. . . ." (Pet. Br. 14-15.) This contention that competition between scheduled and supplemental carriers is precluded by the Act again reflects a misconception of the statutory scheme.

The 1968 ITC legislation makes clear that Congress did not intend to foreclose competition between supplemental and scheduled carriers. Not only does the ITC mode compete with scheduled services for some categories of traffic,

but also when the ITC amendments were enacted, the Senate Commerce Committee specifically quoted with apparent approval the statement of then CAB Chairman Crooker that "[a]n additional benefit to the public has been the *competitive incentive* which the availability of inclusive tour charters has provided to the scheduled carriers." S. Rep. No. 1354, 90th Cong., 2nd Sess. (1968), at pp. 4-5 (emphasis added). While petitioners rely (Br. 16) on a statement in this Court's *Pan American* opinion – "[t]o permit the selling of individual tickets to the general public in direct competition with the regularly scheduled airlines * * * does violate basic policies of the Act" (380 F.2d at 779) – that opinion was issued before Congress made clear in the 1968 legislation that it did not intend to prohibit all charter modes which are marketed to the general public and which compete with scheduled services.

Indeed, the stated policy of the United States Government is that "[b]oth scheduled and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market." *Statement of International Air Transportation Policy*, approved by the President, June 22, 1970, at 7. The Policy Statement continues: "We consider passengers traveling at group rates on scheduled services to be part of that [bulk] market. * * * [T]he Government should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers." *Ibid.*[15] Court decisions have also emphasized that the Act contemplates not only direct competition between supplemental and scheduled airlines, but indeed "maximum feasible competition." *National Air Carrier Association v. CAB*, 436 F.2d 185, 194 (D.C. Cir. 1970); *National Air Carrier Association v. CAB*, 442 F.2d 862, 872 (D.C. Cir. 1971). In the latter case the court stated that "the existence of a market structure conducive to maximum feasible competition" between scheduled and charter carriers "is the highest and best definition

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[15] Similarly, in 1972, in the course of a comprehensive discussion of the transatlantic air market, the Senate Commerce Committee stated that "[t]he U.S. has long favored a balanced air transport policy with scheduled rights and supplemental or charter rights given equal footing." S. Rep. No. 92-593, 92nd Cong., 2nd Sess. (1972), at 14.

of both our national and consumer interest in the conditions under which international air transportation is to be carried on." 442 F.2d at 872.[16]

Lastly, the Board, as the agency charged with administration of the Act, has held in this and prior cases that the scheduled carriers' view of the supplementals' statutory role is erroneous. In the *Transatlantic Supplemental Charter Authority Renewal Case,* Order 72-5-9, approved April 20, 1972, the Board found that contentions of TWA and Pan American similar to those made here were "fundamentally inconsistent with our outlook on the relationship between charter and scheduled carriers." (Mimeo opin. at 6.) It stated:

> "Our approach recognizes that both scheduled and charter services are integral elements of international air transportation fulfilling a legitimate and vital role, and that scheduled carriers and supplementals each have a right to compete for transatlantic bulk traffic." *Ibid.*

Similarly, in its TGC rule making, the Board regarded it "as well established that the charter authority of the supplemental carriers need not be so circumscribed as to completely preclude the supplemental carriers from competing for passenger traffic which might otherwise use scheduled services." (Regulation SPR-61, *supra,* p. 11, 37 Fed. Reg. at 20810.) It concluded that "the requirement of section 101(34) of the Act that the charter services 'supplement the scheduled service' permits the Board to authorize charter services *which it finds are a desirable adjunct to the overall system.*" (*Id.* at 12, 20810; emphasis added.)

In short, the scheduled carriers' view that the supplementals are precluded from competing directly with them, upon which their interpretation of the Act in the instant case is substantially based, is simply erroneous.

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16 The Court quoted with approval the language of the *Statement of International Air Transportation Policy* set forth above, namely, that "[b]oth scheduled and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market." (*Id.* at 864-65.) The Court also has noted one of "the primary reasons which the Board has advanced for allowing supplemental carriers to enter the North Atlantic market: * * * creating a spur to improved service and prices for the traveling public through competition." *National Air Carrier Association, supra,* 436 F.2d at 197.

It should be added that the most reliable indicator of whether a charter mode "supplants" scheduled service is the extent of the diversion it causes. This is the yardstick looked to by the *Saturn* court in adopting its "result oriented" test. 483 F.2d at 1291. Noting that "the consistent lamentations and predictions of doom by diversion raised by the scheduled air carriers in the past have proved . . . to be considerably overstated" (*id.* at 1291-92), the court pointed out that "one cannot really know how the public will react and how the [charter rules] will affect scheduled travel until they are tested in the crucible of the marketplace." (*Id.* at 1291.)

Here, the Board has made a specific finding that "the cumulative effect of the various restrictions on foreign-originating TGC/ABC's will 'ensure that charter travel does not become a guise for individually ticketed services.' " (App. 15a-16a.) Surely, given both this finding and the evident substantiality of the various restrictions relied upon by the Board, the instant rules ought not to be invalidated before they have even been tested "in the crucible of the marketplace." Experience in the marketplace, as the court found in *Saturn*, "is the best way to test the true effects of the [rules], and the Board remains free at all times to adjust its regulations in the interim to adapt to unexpected results." 483 F.2d at 1293.

CONCLUSION

For all of the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

ROBERT M. LICHTMAN
ROBERT E. NAGLE
Lichtman, Abeles, Anker & Nagle, P.C.
1730 M Street, N. W. – Suite 900
Washington, D. C. 20036
Attorneys for Intervenors

October 4, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., Petitioners, v. CIVIL AERONAUTICS BOARD, Respondent.	No. 74-1646

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the brief for Intervenors by causing two copies to be mailed in properly addressed franked envelopes to each of the following:

Carl S. Rowe, Esq.
Harold L. Warner, Jr., Esq.
Chadbourne, Parke, Whiteside
and Wolfe
30 Rockefeller Plaza
New York, New York 10020

Glen M. Bendixsen, Esq.
Associate General Counsel
Litigation and Research
Civil Aeronautics Board
Washington, D. C. 20428

Robert E. Nagle

LICHTMAN, ABELES, ANKER
& NAGLE, P.C.
Robert E. Nagle

Dated: October 4, 1974